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Supreme Court of the United States

OCTOBER TERM, 1966

CONTINENTAL BAKING COMPANY, *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, Continental Baking Company, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit entered September 14, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, affirming an order of the Federal Trade Commission against petitioner, is not yet reported officially but is reported unofficially at 5 CCH Trade Reg. Rep. ¶ 71,891 and is reprinted in Appendix A at p. 1a. The two opinions of the Federal Trade Commission are not

reported officially but are reported unofficially at ¶ 16,843 and ¶ 17,747, 1963-1965 Federal Trade Commission Complaints, Orders, Stipulations, CCH Trade Reg. Rep., and are reprinted in Appendices B and C at p. 22a and p. 85a. The initial decision of the Federal Trade Commission hearing examiner is unreported and appears at Appendix D at p. 100a.

JURISDICTION

The judgment of the Court of Appeals was entered September 14, 1966. Petitioner's request for a limited rehearing en banc was denied October 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a reviewing court, in affirming and enforcing a cease and desist order of an administrative agency, may adopt a ground which has been disclaimed by the agency for deciding that an essential element of a statutory violation has been proved.

2. Whether Section 5 of the Federal Trade Commission Act, which proscribes unfair methods of competition and unfair or deceptive acts or practices "in commerce," covers acts or practices that only collaterally affect minimal interstate sales.

STATUTES INVOLVED

The statutes principally involved in this case are the following:

Section 4 of the Federal Trade Commission Act [38 Stat. 719 (1914), 15 U.S.C. § 44 (1964)]:

> § 44. The words defined in this section shall have the following meaning when found in sections 41-46 and 47-58 of this title, to wit:

> "Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

Section 5(a)(1) of the Federal Trade Commission Act [38 Stat. 719 (1914), 15 U.S.C. § 45 (1964)]:

> § 45(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

STATEMENT

This case was initiated by complaint of the Federal Trade Commission on March 7, 1961. The complaint named Bakers of Washington, Inc. ("Bakers"), an association of wholesale and retail bakers in the State of Washington, the officers of Bakers, all of the more than fifty members of Bakers, including this petitioner, and two non-member corporations. It alleged that these respondents had conspired to raise bread prices in violation of Section 5 of the Federal Trade Commission Act. (R. I, 1-9). Section 5 makes unlawful unfair methods of competition and unfair acts or practices in interstate commerce. The evidence at a hearing before one of the Commission's hearing examiners concerned an alleged conspiracy to raise bread prices in the State of Washington. Continental was alleged to be involved only through its Seattle plant, which competes only in the Seattle market. (R. I, 4; R. III, 497).

The hearing examiner found a Section 5 offense chargeable to Continental and every other named respondent, and proposed a broad, nationwide cease and

desist order. Overruling Continental's legal and factual contentions, the examiner found Continental's acts were both "unfair" and were "in commerce." For the "in commerce" element of the statutory offense the examiner relied on a number of legal theories and citations advanced by Commission counsel, none of which was subsequently adopted by the Commission. (App. D, 124a-130a)

The case went before the Commission on exceptions to the initial decision and proposed order. The Commission in substance affirmed the examiner and made his proposed order its own, but stayed the effectiveness of its action for the reason stated below.[1]

In response to Continental's assertion that the "in commerce" element of the offense had not been proved, Chairman Dixon discussed but expressly declined to rely upon a few sales made to Alaska by a few of the respondents, which were clearly no part of the complaint or the theory upon which the case was tried. Instead, the majority held that

> ". . . this case involves a much larger problem [than Alaska sales]. We think it not only important *but necessary* that we deal with the question of whether these great interstate firms can claim immunity from the statutory prohibition against price fixing in regard to the remaining 99% of the transactions involved, those that took place within the borders of the State of Washington." (App. B, 31a) (Emphasis supplied)

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[1] The Commission's decision was by a three to one vote, with Chairman Dixon writing an opinion for himself and Commissioner McIntyre. Commissioner Anderson concurred in the result, Commissioner Elman dissented, and Commissioner Reilly did not participate.

The Commission majority thereupon considered the nature of Continental's internal operations, concluded on this basis that all of Continental's local acts are "in commerce", and on this ground held that all of the challenged acts of all the parties were "in commerce". In support of this ground of decision the Commission relied upon testimony in an unrelated proceeding. (App. B, 39a-47a).

As required by Section 7(d) of the Administrative Procedure Act 5 U.S.C. § 556(e), 80 Stat. 378 (1966), (formerly 5 U.S.C. § 1006(d) (1964)), Continental was purportedly given an opportunity to "show the contrary" of the officially noticed testimony upon which the Commission's decision rested. After further hearings for this purpose the Commission reaffirmed its first decision with minor modification, citing as a reason that the facts shown on remand were "contrary" to the earlier testimony.[2] (App. C, 91a).

Continental petitioned for review alleging, among other things, that the Commission's finding that the questioned acts were "in commerce" was not supported by substantial evidence and was impermissible as a matter of law. The Court of Appeals affirmed the Commission's order without modifications. It did not rule on Continental's contentions, but held instead that the "in commerce" element of the offense charged was made out because the challenged acts and practices had an "effect" upon sales of bread which was subsequently shipped by others to Alaska. (App. A, 3a-5a) This ground was, as noted, expressly disclaimed by the Commission in its decision.

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[2] Only Commissioners Dixon and McIntyre joined in this decision. Commissioner Elman again dissented and the two other members did not participate.

REASONS FOR GRANTING THE WRIT

The Court of Appeals breached one of the most firmly established restrictions on the scope of judicial review of administrative action by enforcing an administrative order on grounds different from those relied upon by the agency. In doing so the court in addition ruled in a way that conflicts with one of this Court's leading decisions on substantive federal law.

The Commission issued a nationwide order, broad in its terms, on the grounds, based on findings relating to the extent of Continental's head office control over local Seattle merchandising, that all of Continental's sales in Washington were in interstate commerce. The Court of Appeals affirmed the Commission's order, but ignored the Commission's grounds. Avoiding the numerous legal difficulties that the Commission's choice of ground had created, the court ruled that the alleged conspiracy was an act or practice "in commerce" because of a supposed effect on miniscule sales by a few respondents in the Alaska trade. The court's ruling, as a matter of substantive federal law, is in conflict with this Court's decision in *FTC.* v. *Bunte Bros., Inc.*, 312 U.S. 349, which holds that an act that merely affects interstate commerce is not "in" such commerce within the meaning of Section 5. The question thus raised is treated in Part II below.

Preliminary to this substantive error, moreover, the Court of Appeals violated one of the most familiar principles of judicial review. The Commission had disclaimed reliance on the Alaska sales in finding a violation and in concluding to issue a broad, nationwide cease and desist order. To affirm the Commission's order on the basis of such sales, as the Court of Appeals did, is squarely contrary to the doctrine of *SEC* v. *Chenery Corp.*, 318 U.S. 80, and the line of decisions

that have followed *Chenery*. This question is treated immediately below.

I. The Court of Appeals' Affirmance on Grounds Not Relied On by the Commission Is Flatly Contrary to a Fundamental Rule of Judicial Review of Agency Action.

There is a "simple but fundamental rule of administrative law," that "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196; *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87. The decision below plainly violated this principle.

The Commission did not elaborate on its reasons for rejecting the few Alaska sales as a basis for finding the "in commerce" element of the offense and for adopting a broad ground instead. There obviously were many such reasons. No Alaska conspiracy had been charged. The conspiracy among the fifty odd parties that was charged clearly would not permit a finding of a four party conspiracy respecting Alaska. *United States* v. *Di Re*, 159 F. 2d 818 (2d Cir., 1947) *aff'd*, 332 U.S. 581; *United States* v. *Falcone*, 109 F. 2d 579 (2d Cir. 1940) *aff'd*, 311 U.S. 205. Moreover, there was no evidence in the record sufficient to support a finding as to any conspiracy relating to Alaska sales, and there was no evidence on which to find that the conspiracy that was charged had any effect upon Alaska sales.[3] Finally, the Commission may have decided on the broad ground it chose because the few sales to the Alaska traders would not support a broad order, nationwide in extent, against all of the respondent firms, virtually none of which had anything whatever to do with the Alaska trade.

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[3] For example, there was evidence as to the price on Alaska sales of only one of the four sellers in that trade. (R. VI, 344; see App. B, 30a, n. 1).

Whatever its reasons, what the Commission did is perfectly clear both from the language of its opinions and from the official notice procedures which it employed to support its decision. It adopted a single ground for holding that all the acts complained of, by all of the parties, were "in commerce." And on this ground it concluded to issue a nationwide order, broad in its terms. It is equally clear that the Court of Appeals affirmed on a wholly different ground. (App. A, 3a-5a)

Affirmance on grounds not relied upon by the Commission is contrary to established law. *SEC* v. *Chenery Corp.*, 318 U.S. 80. In the second *Chenery* decision this Court explained its prior holding:

> "When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." 332 U.S. at 196.

Recent decisions of this Court have emphatically confirmed this principle. *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 168-9; *Bell* v. *United States*, 366 U.S. 393, 413; *American Trucking Ass'ns, Inc.* v. *United States*, 364 U.S. 1, 13-14.

The Court's language in *Chenery* is directly applicable. Of course "the administrative agency alone is authorized" to issue the broad cease and desist order

issued here. Plainly the court below has not judged "the propriety of [the broad order] solely by the grounds invoked by the agency." The court below either concluded that the grounds invoked by the Commission were "inadequate" or it did not reach the question. In these circumstances, then, the court below "was powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."

The reasons and propriety of the *Chenery* rule are exemplified by this case. There is simply nothing to suggest that the Federal Trade Commission would have issued a perpetual nationwide order, broad in scope, against Continental (and all other respondents) if the only facts establishing a Section 5 offense related to a few sales by a few parties to the Alaska trade. This is especially so in view of the fact that the Commission has never even claimed that any of Continental's managing personnel, outside of its local Seattle employees, had any knowledge of the events alleged. The quotation above from the Commission's decision, in fact, strongly suggests that it was in the Commission's judgment "necessary" to find a broader basis of violation in order to warrant the broad order that it issued.[4]

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[4] This justification for a broad, nationwide order may have been in the Commission's judgment particularly necessary as to all those respondents, such as Safeway Stores, Inc., who had nothing to do with sales to the Alaska trade.

II. The Court's Conclusion That Acts and Practices Which Merely Collaterally Affect Interstate Commerce Are Within the Reach of Section 5 Has Been Fully Considered and Rejected by This Court.

The holding of the court below that the agreement in the Seattle market charged to Continental and the numerous other respondents was "in commerce" because it had an "effect" upon sales to the Alaska trade is in flat conflict with the decision of this Court in *FTC* v. *Bunte Bros., Inc.*, 312 U.S. 349, a case which was neither discussed nor even cited by the court below despite the fact that Continental's reply brief and petition for rehearing both pointed out that *Bunte* prevented an affirmance based on the Alaska sales.

In *Bunte*, the Commission asked this Court to reverse a decision of the Court of Appeals for the Seventh Circuit which had held that Section 5 of the Federal Trade Commission Act "authorized the Commission to proceed only against business practices employed in interstate commerce." 312 U.S. at 350. The Commission urged that Section 5 should, despite its terms, be read as reaching unfair practices *affecting* interstate commerce as well as such practices *in* such commerce.

The Court, in an opinion by Mr. Justice Frankfurter, observed first that

> "While one may not end with the words of a disputed statute, one certainly begins there. 'Unfair methods of competition in commerce' are the concern of § 5, and the Commission is 'directed to prevent persons . . . from using unfair methods of competition in commerce . . .' The 'commerce' in which these methods are barred is interstate commerce." (Footnote omitted) 312 U.S. at 350-51.

The Court next adverted to the fact that the case before it represented the first time in the history of the Commission's administration of the Act that it had claimed such a sweeping reach for Section 5. The Court noted in this connection that

> "This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce." 312 U.S. at 352.

The Court concluded that

> "This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished." 312 U.S. at 355.

Bunte represents the definitive statement of the scope of Section 5 of the Federal Trade Commission Act. It has never been modified by any decision of this Court. The Commission has recognized its continuing force and effect:

> ". . . the relevant jurisdictional issue is whether the practices subjected to challenge were employed in commerce, and not whether all operations of the entity employing the methods, acts or practices were performed in interstate commerce." *The Union News Co.,* Dkt. 7396 (January 10, 1961), *modified and aff'd sub nom., American News Co.* v. *FTC,* 300 F. 2d 104 (2d Cir. 1962), *cert. denied,* 371 U.S. 824.

In virtually every one of its Annual Reports since 1941 the Commission has recognized these limits of

Section 5. See, *e.g.*, FTC 1965 Annual Report 11; FTC Annual Reports, 1941-1953, pp. 1 and 2. All of its trade regulation rules rely upon findings that the practices in question have been employed "in commerce." See, *e.g.*, 2 CCH Trade Reg. Rep. ¶¶ 7195, 7197, 7921, 7925, 7929, 7933, 7935, 7042 (1963-1966). Commissioner Dixon has himself recently recognized the continuing viability of the *Bunte* decision. Dixon, *Federal-State Cooperation to Combat Unfair Trade Practices,* 39 Stat. Gov't 37, 38-39 (1966).

The Court below erred in completely disregarding *Bunte* and the consistent administrative enforcement of Section 5 since that decision.

CONCLUSION

It is respectfully suggested that because of the obvious errors in the opinion of the court below this Court should summarily reverse and remand this case. In any event, a writ of certiorari should be issued.

Respectfully submitted,

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